MISCELLANY.

Limiting or Prohibiting the Possession of Intoxicating Liquors for Personal Use.—"Alas, poor Yorick, I knew him well." This feeling sentiment appeared recently under a cartoon depicting a thirsty faced individual holding in his arms an empty beer keg through the bung holes of which, pictured as the eye holes of a skull, the last drop of amber liquid had long since run. Many is the man, and hush! speak it low, and woman too, who will gaze with fond recollections and intense longing on the empty receptacles which in bygone days were filled with the spirit that cheers. And their inability to replace the dear lost ones will cause exceeding hurt. But they will get over it, for they say that time heals all things, and in days to come they will cease to mourn the lost one and their regrets will be softened by the pictures they can conjure up of the good times that flowed from the associations with the long departed. To them the adage that there are as good fish in the sea as ever came out, will no longer give comfort and they must be content to dwell in the pleasant memories of the past. A kind of spiritualistic seance, as it were. But how about him who has tenderly nursed and preserved his loved one to soothe and calm his declining years, housing her within impregnable walls (cellars rather) and surrounding and protecting her against inquisitive and covetous eyes? What will be his feelings when the ruthless hands of the law break down his stronghold and seize and bear away his mistress to destruction? It is one thing to say, No more shall you flirt with and wed the nymphs of Bacchus, but quite another to seize the nymph whom you have lawfully wedded and forcefully tear her from your loving embrace. And this brings us to the serious side of the question.

How far, in the exercise of its police power, may the state go in prohibiting the possession and personal use of intoxicating liquors which have been lawfully acquired? In many states laws have been passed limiting the amount that may be possessed at any one time, and in some the possession of any amount whatsoever, even one teeny weeny drop of the awful stuff, has been prohibited. And these laws have been declared to be a proper and lawful exercise of the police power by the highest court in the land. It is interesting to note the gradual change in judicial opinion on this question in keeping with the growth of the prohibition movement. At first the legislatures were content to prohibit its manufacture and sale and in most instances they were particularly careful to insert a provision that the law did not apply to the possession of liquor for personal use. But later they began to place a limit on the amount that might be possessed, and finally in some instances prohibited the possession of any quantity whatsoever. If the press reports of the bills introduced in Congress to enforce the prohibition laws are correct the

latter provision is embodied therein. That the acquisition of liquor for personal use may be prohibited seems to be conceded, but whether the state can by law deprive one of the possession of liquor lawfully acquired, is another question, though the trend of the more recent decisions is strongly in favor of the view that it can.

One of the earliest cases passing on the power of the state to forbid the possession of intoxicating liquors for personal use was Preston *v.* Drew, 33 Me. 558, 54 Am. Dec. 639, decided in 1851. Here a statute providing that no action could be maintained for the recovery of the possession of intoxicating liquor or the value thereof was held to be unconstitutional as a deprivation of property without due process of law. The court, recognizing that the state might legally forbid the future acquisition of intoxicating liquors, said: "The State, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals shall not constitute property, within its jurisdiction. It may come to the conclusion that spirituous liquors, when used as beverage, are productive of a great variety of ills and evils to the people, both in their individual and in their associate relations. * * * Such conclusions would be justified by the experience and history of man. If a legislature should declare that no person should acquire any property in them, for such a purpose, there would be no occasion for complaint that it had violated any provision of the constitution." And hearken to this from Kentucky (Com. *v.* Campbell, 133 Ky. 50), 117 S. W. 383, 19 Ann. Cas. 159, 24 L. R. A. (N. S.) 172. It sounds like a voice from the tomb: "The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed to him by the Constitution, and cannot be abridged as long as the absolute power of a majority is limited by our present Constitution. The theory of our government is to allow the largest liberty to the individual commensurate with the public safety, or as it has been otherwise expressed, that government is best which governs the least. Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent and to make them conform to a standard not of their own choosing, but the choosing of the lawgiver; that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink or think, thus crushing out individuality and insuring Chinese inertia by the enforcement of the use of the Chinese shoe in the matter of private conduct of mankind. We hold that the police power—vague and wide and undefined as it is—has limits, and in matters such as that we have in hand its utmost frontier is marked by the maxim 'Sic utere tuo ut alienum non ledas.'" Among the many cases supporting the sound constitutional doctrines announced in the cases just quoted from, see Luera's Application,

28 Cal. App. 185, 152 Pac. 738; Cortland *v.* Larson, 273 Ill. 602, 113 N. E. 51, Ann. Cas. 1916E, 775, L. R. A. 1917A, 314; Shreveport *v.* Hill, 134 La. 352, 64 So. 137, Ann. Cas. 1916A, 283; Flowers *v.* State, 8 Okla. Crim. 502, 129 Pac. 81; State *v.* Rookard, 87 S. C. 442, 69 S. E. 1076. The theory of these cases is that there being a property right in intoxicating liquors, lawfully acquired, it is beyond the power of the state in the exercise of its police power to destroy it.

But as the cohorts of prohibition have advanced, the constitutional barriers have fallen one by one, until we come to the decision in Crane *v.* Campbell, 245 U. S. 304, 38 S. Ct. 98, 62 U. S. (L. ed.) 304. This case arose in Idaho and involved the construction of a statute making it unlawful for any person to have in his possession any intoxicating liquors of any kind for any use or purpose except for scientific, medical or sacramental purpose, as provided by the act. The Idaho Supreme Court held the statute to be constitutional and on appeal to the Supreme Court of the United States the Idaho case was affirmed. After stating that it is well settled that a state may prohibit the manufacture, sale, gift, purchase or transportation of intoxicating liquors, the Supreme Court goes on to say: "As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. * * * And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose. We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State." Apparently this decision gave the death blow to John Barleycorn, at least in so far as Idaho was concerned. But unfortunately the court in this case did not take notice of the time when the liquor was acquired and the language used is seemingly broad enough to cover the possession of liquor no matter when acquired or whether its acquisition was lawful or unlawful. At any rate it was so interpreted by the Utah court in State *v.* Certain Intoxicating Liquors, 172 Pac. 1050, L. R. A. 1918E, 943, wherein it was held on authority of the Crane case, supra, that a statute prohibiting the possession of intoxicating liquor for personal use was constitutional, and that it was immaterial when, how or where it had been acquired. It appeared from the facts in this case that the

liquor was lawfully acquired before the statute went into effect and the lower court held the statute to be unconstitutional basing its ruling on the ground that property rights in liquor lawfully acquired could not be destroyed by the state. In reversing the case on that point, the Supreme Court said: "If we correctly interpret the meaning of the opinion of the very able and learned trial judge, he holds that the acts does not undertake to prohibit the use or drinking of intoxicating liquors within the state except as in the act expressly mentioned, and that the state may not, in the lawful exercise of its police powers, confiscate and destroy intoxicating liquors within the state, when acquired for personal use and recognized as property before the act became effective. * * * We have heretofore pointed out that in our judgment it was the intent of the legislature, and that the plain provision of the act abolishes, aside from the exceptions expressly made, all property rights in alcoholic liquors on and after August 1, 1917, no matter where or how acquired, for what use intended, or how possessed. It necessarily follows that the very purpose and intent of the act was to preclude the right to use intoxicating liquor within the state except for the specific purposes in the act expressly mentioned and reserved." And now we come to the case of Barbour *v.* Georgia, 39 S. Ct. 316. Here the Georgia court like that of Utah held that it was within the police power of the state to prohibit the possession of intoxicating liquor for personal use, and the fact that it incidentally destroyed the property rights lawfully acquired therein before the law became effective did not render it void as contrary to the Fourteenth Amendment of the Federal Constitution, and the Supreme Court of the United States sustained the decision. Among the recent decisions adopting this construction, see the following: Frazier *v.* State (Ala.), 73 So. 764; Southern Express Co. *v.* Whittle, 194 Ala. 406, 69 So. 652; O'Rear *v.* State (Ala.), 72 So. 505; State *v.* Carpenter (S. C.), 92 S. E. 373. As may be seen from these cases the tendency of the more recent legislation with respect to alcoholic liquors is directly against the consumption on the theory that it is in consumption always that the evil lies.

But in the Barbour case we see the first glimmer of hope for the man with the well stocked cellar—a small, very small one it is true, but nevertheless it is there. The court sustains the decision of the Georgia court, but is very careful to point out that in that case, although the liquor was acquired before the law became effective, it was acquired after the passage of the act, and though lawfully acquired, the possessor was put on notice by the passage of the law of the inherent evil qualities of his property. It also points out that in the Crane case it only decided that liquor acquired after the passage of an act forbidding its possession, though lawfully acquired, could be outlawed by the statute, and particularly states that in

neither the Crane case nor the Barbour case did it decide that liquor acquired before the passage of an act making its possession unlawful could be divested of its property rights by the statute. So here we find the one possible oasis in the coming desert. The court also states that the particular question as to whether a state can legally prohibit the possession of liquor acquired before the passage of the act has never been passed on by it, although the two cases cited as touching on the question give a very clear indication of what would have been decided by the court as then constituted. In Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 U. S. (L. ed.) 989, the court while holding that a state might enact a law prohibiting the manufacture and sale of intoxicating liquor said: "We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of Bartemeyer *v.* Iowa (18 Wall. 129), 21 U. S. (L. ed.) 929, was not in existence when the liquor law of Massachusetts was passed." And in Bartemeyer *v.* Iowa, 18 Wall. 129, 21 U. S. (L. ed.) 929, it was said: "The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property."

The reasoning on which the decision in the Barbour case is based is somewhat difficult for the ordinary mind to grasp. The court says: "Does the Fourteenth Amendment, by its guaranty to property, prevent a state from protecting its citizens from liquor so acquired? A state, having the power to forbid the manufacture, sale, and possession of liquor within its borders, may, if it concludes to exercise the power, obviously postpone the date when the prohibition shall become effective, in order that those engaged in the business and others may adjust themselves to the new conditions. Whoever acquires, after the enactment of the statute, property thus declared noxious, takes it with full notice of its infirmity and that after a day certain its possession will, by mere lapse of time, become a crime." Now if property rights existed in liquor acquired after the passage of the act but before it went into effect how could it be divested by the law becoming operative? In other words how did the law going into effect affect the inherent evil nature of the liquor? Was it innocent of evil during the period between the passage of the act and the time set for it to go into effect, and then suddenly by the magic touch of legislative legerdemain did it become invested with all the qualities of the evil one? And could it be said that liquor purchased before the passage of an act declar-

ing its possession to be unlawful retained its innocent and law abiding qualities, while liquor purchased after the passage but before the law became effective lost its innocent character and assumed the livery of the evil one on the happening of the latter event? It would seem that the wish to uphold the statute was stronger than the reasoning on which the decision was based.

What does this opinion presage as to the court's action, should it be called on to construe a law of Congress, enforcing the prohibition amendment, containing provisions prohibiting the possession of intoxicating liquors for personal use? Does not the amendment put all on notice of the evil qualities of liquor and in the language of the court "whoever acquires, after the enactment of the statute, property, thus declared noxious, takes it with full notice of its infirmity, and that after a day certain its possession will, by mere lapse of time, become a crime?" The cases are certainly parallel, and if a legislative enactment can warn the possessor of the evil qualities about to inhabit his property surely an amendment to the Constitution adopted by forty-five states is a trumpeting announcement that that which to-day is innocent of evil in the eyes of the law shall in the near future be looked upon by the same law as invested with noxious qualities. In one other recent case the Supreme Court has shown some signs of relenting in its strict construction of the liquor laws. In U. S. *v.* Gudger, 39 S. Ct. 323, the court held that the Reed Amendment prohibiting the transportation of intoxicating liquor into any state which had prohibited its manufacture, sale, etc., did not apply to liquor being transported through the state. In this case it appears that a passenger bound from Baltimore to Asheville, North Carolina, was arrested in Lynchburg, Virginia, where his train was temporarily stopped and his baggage searched.

But the state legislatures and courts are still revelling in extreme and rigorous laws. As an instance to what extremes a law-making body may go in its zeal to deal a death blow to intoxicating liquors, take the recent statute passed by the legislature of Georgia. By this statute it is made illegal to manufacture, sell, etc., all liquors and beverages or drinks made in imitation of or intended as a substitute for beer, wine, whisky or other alcoholic or spirituous, vinous or malt liquors (Acts 1915, p. 77). And the Supreme Court of Georgia, holding this act to be constitutional even when applied to beverages admitted to be non-intoxicating, said: "On the basis of protecting health, morals, and the public safety, the provisions of the act making it illegal to manufacture, sell, etc., intoxicating liquors have been held to be a valid exercise of the police power. Delaney *v.* Plunkett, 146 Ga. 547, 91 S. E. 561, Ann. Cas. 1917E, 685, L. R. A. 1917D, 926. The manufacture and sale of drinks made in imitation of or intended as a substitute for intoxicating drinks as specified in the act, although not intoxicating themselves, afford a cloak for

clandestine manufacture, sale, etc., of intoxicants—the evil which the legislation was designed to prevent. Under such circumstances, the power to prohibit the manufacture, sale, etc., of the beverages will include the power also to prohibit the manufacture and sale of substitutes and imitations. Purity Extract, etc., Co. *v.* Lynch, 226 U. S. 192, 33 S. Ct. 44, 57 U. S. (L. ed.) 184. Under this view, it is within the police power of the state to enact a law prohibiting the manufacture and sale of liquors and beverages not intoxicating in character, but made in imitation of or intended as a substitute for beer, ale, wine, whisky, or other alcoholic or vinous or malt liquors." Kunsberg *v.* State, 147 Ga. 95 S. E. 12. Luckily for the Salvation Army the twenty-five or more saloons in New York city on which it has obtained options are not located in Georgia. It is the announced purpose to conduct these saloons in all particulars, i. e., with bars, mirrors, fixtures, brass rail and all, just as they are now conducted, except that in the place of alcoholic beverages there will be served over the bar as a substitute, soda water, buttermilk, ice cream, etc.

There is another phase of this question which deserves careful and unprejudiced consideration. For years the right of property in intoxicating liquors was recognized by the law-making bodies and the courts. Only in comparatively recent times has this been denied. If such a right of property exists it is setting a dangerous precedent to deprive the owner of it by legislative ukase. Where will such a precedent lead us? The right of property, always so jealousy guarded by civilized governments, was never before in the history of the world so jeopardized. One big country has repudiated it in a large measure and the leaders of that doctrine are endeavoring with all their might to fasten it upon others and with some degree of success in its neighboring states. Even here in our own great land of the free these destroyers of human liberty in the name of liberty are organizing and their insidious propaganda is being industriously spread. The professional reformer, whether he be prohibitionist, advocate of blue laws, or what not, is prone to say of such arguments as the above that they display "prejudice, blind prejudice, born of interest and not of reason." But is it not time for all of us to cease imputing prejudice and to realize that an honest difference of opinion can exist without prejudice and without ulterior motive? When one looks at the question from the standpoint of the lover of constitutional government and not that of a partisan or follower of any particular fad or ism, can it be said that the precedent set by such decisions does not lead logically and directly to the doctrine advocated by the Bolsheviki? To them all property possessed by the individual is against the health, morals, and general welfare of the public, so they take it away. In the present case it is prop-

erty in liquor lawfully acquired that is taken, but for the same reasons as announced for the action of the Bolsheviki. The tendency of such decisions is well expressed by Chief Justice Browne in his dissenting opinion in Morasso *v.* Van Pelt recently decided by the Florida Supreme Court. The majority, following the decision of the Crane case, upheld the Florida law limiting the amount of intoxicating liquor that might be possessed for personal use. But in an exceptionally well-reasoned dissenting opinion Justice Browne said: "The right to abolish private ownership of property for the public welfare is predicated on the doctrine that whatever a strong and preponderant public opinion regards as against the prevailing morality and inimical to the public welfare constitutional guarantees are impotent to secure. This is the apotheosis of the police power, at whose feet all constitutional guarantees must humbly kneel, petitioning but not demanding observance. Before it, the right of free speech, a free press, freedom of conscience and religious worship, must yield. The attention of the civilized globe is now centered in one of the great nations of the world whose government, conducted upon this doctrine, is ruthlessly destroying life, liberty and property. There the 'prevailing morality' and the 'strong and preponderant opinion' is that private ownership in lands and manufacturing capital, and private wealth, are inimical to the public welfare; that they produce idleness, pauperism, suffering and crime, and consequently must be abolished. These people feel as deeply on these subjects as our people feel on the liquor question. Their doctrine is not a new one. It was proclaimed by Karl Marx more than half a century ago, but it has recently become more insistent, and its spread threatens our own institutions. He taught that 'the proletariat will use its political supremacy to wrest by degrees all capital from the bourgeoise,' and his followers advocate that 'the institution of private property, that is, the right of private ownership in things tangible or intangible, is to be abolished—by indirect and peaceful means as far as convenient, but by violence so far as conducive to speed and thoroughness of the change.' It is a short step—one that will be essayed much sooner than many anticipate—from abolishing private property in intoxicating liquors, to abolishing without compensation private property in lands, manufacturing capital, railroads or other public utilities, whenever a 'strong and preponderant public opinion' shall consider the public welfare demands it. When that time comes, the decision of the majority of the court in this case, and those in line with it, will be authority for legislation along these lines, and they will plague those who too late seek to check further inroads upon the rights of property. Not the least of the evils that the traffic in liquor is responsible for, is this line of decisions sustaining laws destructive of property and

property rights, enacted in response to 'strong and preponderant opinion.'"

Do not let the possessors of well-stocked wine cellars delude themselves with the idea that Congress or the states will not go to such extreme lengths as to take away from them the liquor which they have lawfully acquired for their own personal use. Such laws already exist in not a few states and a similar provision is incorporated in one of the bills introduced in Congress, and one of our most prominent business men and capitalists, Mr. Schwab, according to the press, advocates such a law. In his opinion if we are to have nationwide prohibition we should be consistent about it and make it apply to all alike. If we are to deprive the poor man of his beer, then make the rich man empty his wine cellars. And there are many who agree with him. A law prohibiting the possession of any intoxicating liquors, no matter when, where or how acquired, would do this, and the Supreme Court has said that it is a lawful exercise of the police power, certainly to the extent of liquor acquired after the enactment of laws prohibiting their possession although acquired before the law becomes operative.—Minor Bronaugh in Law Notes.